Supreme Court, U.S.
FILED

No. 10-874

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In The

# Supreme Court of the United States

Phillip S. Woodruff

*Petitioner*

v.

Neil McPhie, Chairman,
U.S. Merit Systems Protection Board

*Respondent*

On Petition For Writ of Certiorari
To the Court of The United States Court of Appeals

## PETITION FOR WRIT OF CERTIORARI

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## Questions Presented for Review

1. Whether a Federal Employee must first Contact an Equal Employment Opportunity Counselor at the Agency Where the Alleged Discrimination Occurred?

2. Whether the Merit System Protection Board (MSPB), a Federal Government Agency, or its employees, are immune from liability for acts of discrimination against other federal employees?

3. Whether a federal employee who has been discriminated against by an employee of the MSPB, may properly file a discrimination complaint against the MSPB employee within the MSPB's internal office of EEO or an EEO Counselor?

4 Whether a conflict exists by MSPB Chairman Neil McPhie serving concurrently as advisor to the Federal Circuit Court, in as much as this Court is the principal path for virtually all MSPB Appeals by federal employees.

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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## OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia is not published.

## STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).
The U.S. Court for the District of Columbia Order was rendered on March 28, 2008.
(See Appendix A)
The U.S. Court for the District of Columbia Memorandum and Opinion was rendered on January 23, 2009
The U.S. Court of Appeals District of Columbia Circuit's Mandate was rendered on August 13, 2010.
(*See* Appendix C).
The U.S. Court of Appeals District of Columbia Circuit's Judgment was rendered on June 25, 2010. (See Appendix D)
The U.S. Court of Appeals Order denying rehearing en banc was rendered on July 28, 2010. (See Appendix E)

## STATEMENT OF THE CASE

1. At the time of the matter in question, Phillip S. Woodruff, "Woodruff" was a veteran senior management official at the FAA Headquarters in Washington, D.C.

2. Woodruff filed a complaint against his employer for forced retirement which he elected to be heard before the MSPB.

3. Woodruff requested disability accommodations for the hearing. The MSPB ALJ denied accommodations for the hearing which was scheduled for the morning. Woodruff advised the ALJ that he was disabled and could not make a morning hearing due to medications and therapy. Woodruff asked for an afternoon hearing time. The ALJ advised Woodruff that if he did not show for the morning hearing his case would be dismissed.

4. Woodruff filed a discrimination complaint with the MSPB following this act of discrimination by the MSPB ALJ.

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[1] Prior to this telephone conference, the MSPB ALJ had called Mr. Woodruff to have a conference with the agency to schedule dates. After the conference had ended, the MSPB ALJ thought she had disconnected from Mr. Woodruff's line. However, the line did not disconnect and the MSPB ALJ and agency continued the conversation discussing the case. The agency attorney was also taking courses taught by and at the MSPB during this time.

5. A prehearing telephone conference was scheduled by the MSPB Administrative Law Judge, Michelle Hudson to dismiss the complaint against the FAA.

6. Prior to the telephone conference, the MSPB ALJ had *ex parte* communications with the Agency, Mr. Woodruff's employee.[1]

7. During the telephone conference, the MSPB ALJ informed Mr. Woodruff that if he did not settle during the telephone conference, she would rule against him, since she was "busy and had no time" to spend on his case.

8. The MSPB ALJ was not prepared for the teleconference – she was at home and did not have the file and relied upon the Agency to give her information about the case.

9. Mr. Woodruff was given only 20 minutes to review a settlement agreement that was prepared by the agency.

10. Mr. Woodruff was told by the MSPB ALJ he must sign the settlement agreement immediately and return the fax or his case would be dismissed. No one from the agency was available with authority to approve the settlement or sign the settlement agreement.

11. Mr. Woodruff requested that he have additional time to review the settlement agreement – this was denied.

12. Mr. Woodruff asked that he have time for an attorney to review the settlement agreement – this too was denied.

13. The agency attorney did not have authority to sign the agreement, nor was anyone from the agency available during the telephone conference as requested by Mr. Woodruff and required by the MSPB ALJ and by law.

14. The agency did not review or sign the settlement agreement until later the following day.

15. As required by law, Mr. Woodruff immediately notified the ALJ that he wanted the settlement agreement voided.
The ALJ denied this request.

16. Mr. Woodruff appealed to the MSPB Board, chaired by Neil McPhie, for reconsideration and the Board denied.

17. Mr. Woodruff was advised by the MSPB, Department of Transportation, the FAA and EEOC that as a Federal Employee he should first notify the MSPB agency and then file a complaint of discrimination against the MSPB ALJ with the agency where the discrimination occurred. This he did. Woodruff also read this procedure in the Federal Guidelines.

18. Mr. Woodruff's notification and claim was accepted by the Director of the MSPB Office of Equal Employment Opportunity and the MSPB office completed the investigation, assigned an EEO Counselor, and issued the final report.

18. Mr. Woodruff was notified by the MSPB over 180 days after filing his complaint that the MSPB was the improper venue and they had no jurisdiction for Woodruff's complaint.

19. Further, this delay in the decision by MSPB, which, even if true, should have been made immediately, was past the time in which Mr. Woodruff could re-file his complaint therefore the only action available was the Federal Court.

20. The MSPB is an agency of the Federal Government established expressly for the purpose of assisting and supporting the injured or otherwise protected federal employer. Here they failed their mission.

## REASONS FOR GRANTING THE PETITION

1. Mr. Woodruff has not yet received Due Process for the acts of discrimination against him by a federal employee, specifically a MSPB Administrative Law Judge.

2. State clearly the rights, requirements, responsibilities and remedies for federal employees experiencing discrimination in the workplace by federal employees in other agencies. Specifically the Court should clarify and distinguish the role of the Equal Employment Opportunity Commission, difference of the EEO Counselor and offices, the federal agency's, where federal employees serving as counselors and advisors on EEO matters.
Such federal employees and agencies, it should be made clear, are not immune from liability for acts of discrimination to other federal employees.
The MSPB ALJ clearly discriminated against Mr. Woodruff and Mr. Woodruff should be granted relief from such discrimination by a federal employee in another federal agency.

3. The MSPB ALJ violated the Older Workers' Benefit Act when Mr. Woodruff made requests for time to review the settlement agreement and a request for an attorney to review the agreement.

4. To determine whether a conflict of interest exists with Neil McPhie as chairman of the MSPB and also serving as a advisor to the Federal Circuit Court that exclusively hears MSPB cases?

## ARGUMENT

**Review is Warranted to Resolve the Conflict as to how and where a Federal Employee may file a Discrimination Complaint against a Federal Employee in a Different Federal Agency, and specifically a discrimination complaint involving the MSPB Administrative Law Judge.**

**A. Federal law states that an employee may bring a discrimination complaint to any federal agency.[2]**

Venue for Mr. Woodruff's complaint against the MSPB ALJ was confirmed by the MSPB Office of Equal Employment Opportunity, the U.S. EEOC and Mr. Woodruff's own agency EEO office manger and counselor.

Mr. Woodruff followed the guidelines as it is clearly stated that Woodruff should properly file his complaint against the MSPB ALJ with the MSPB Office of Equal Employment Opportunity.

**A federal employee or applicant must first contact an Equal Employment Opportunity (EEO) Counselor *at the agency where the alleged* discrimination *occurred.*"[2]** (emphasis added).

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[1] Facts About Federal Sector Equal Opportunity Complaint Processing Regulations (2009). See Federal Law of Employment Discrimination, 6th E d., 24.02; Federal EEO Complaint Processing Procedures; E34-35.

[2] 29 CFR Part 1614

The Court of Appeals erroneously notes that Mr. Woodruff filed a complaint with the EEOC and cites *Smith v. Casellas,* 119, F.3d 33 (D.C. Cir. 1997) noting that "Congress has not authorized, either expressly or impliedly, a cause of action against the EEOC for the EEOC's alleged negligence or other malfeasance in processing an employment discrimination claim."

In fact, Mr. Woodruff did not file a claim against the EEOC, but rather against the MSPB, an agency of the Federal Government.

Further, in *Moser v. United States,* 341 U.S. 41, 47 (1 95 I), Moser was erroneously informed by the State Department that a claim for exemption would not bar him from later obtaining citizenship, and he relied on that advice. The Supreme Court decided, despite the absence of any such provision on the face of the statute, that "nothing less than an intelligent waiver is required by elementary fairness." The Court held that Moser's claim for exemption did not bar him from later becoming a citizen. Id. at 439. " Where strict adherence to the literal language of the statue would produce results that Congress would not have desired, this Court has interpreted other statues to authorize equitable exceptions though the plain language of the statue suggested a contrary result. Moser was not an aberration" Id. Mr. Woodruff requests no less.

Like in Moser and in Richmond, Mr. Woodruff relied to his determinant on erroneous information as to where to file a complaint against the discriminatory practices of an MSPB Administrative Law Judge.
He trusted that these entities knew the rules, regulations and laws and relied upon the information, only to discover too late that this information they stated was wrong.

The MSPB, a federal agency was formed with the intention to protect federal employees.
As such, they are not exempt or immune from liability for the acts of discrimination by their employees to other federal employees. All federal employees are held to the same standard.

The Mission Statement of the MSPB reads:
**"The Merit Systems Protection Board (MSPB) is an independent quasi-judicial agency established to protect Federal merit systems against partisan political and other prohibited personnel practices and to ensure adequate protection for employees against abuses by the agency."** (emphasis added).

**Review is Warranted to Resolve the Conflict as to What Court a Federal Employee May File a Discrimination Complaint against a Federal Employee.**

The courts below all agree that while Mr. Woodruff may be correct in the fact he was discriminated, no court, however, will hear the case. As a result, Mr. Woodruff was denied Due Process of his claim of discrimination as a matter of law.

The MSPB appeal process is to first go to the Federal Circuit; this is a flawed process for two reasons: 1). All discrimination claims must be abandoned. 2). The Chairman of the MSPB sits on the Federal Circuit Court as an advisor. It is virtually cost prohibitive. Consequently, MSPB complainants have a three-fold disadvantage in that discrimination complaints must be filed in the Federal District Court and other claims must go through the Federal Circuit Court which is prejudiced at least in appearance, if not in fact, by the presence of the MSPB Chairman, Neil McPhie.

The Federal Circuit changed the caption of the case filed by Mr. Woodruff to remove Neil McPhie and the MSPB as Defendants. Mr. Woodruff filed Motions to change the caption of the case back to *Woodruff v. McPhie, MSPB;* the Federal Circuit steadfastly refused to change the caption as filed. Consequently, Mr. Woodruff was forced to withdraw the complaint from the Federal Circuit.

In fact, Mr. Woodruff made it clear to all courts that his complaint was against the MSPB ALJ, Michelle Hudson and her acts of discrimination against him. At no time did Mr. Woodruff claim his case was against the EEOC or the federal agency where he was employed.

Since Mr. Woodruff's claim included a discrimination claim against the MSPB ALJ, Mr. Woodruff correctly had the case moved to the District Court. "**The District Court has jurisdiction of all claims in cases involving discrimination and allows for de novo review of discrimination claims.**"[3]

Due Process reserves the right to have Mr. Woodruff's case heard by a court of law. The United States District Court in the Eastern District of New York found in *Sutherland v. Barnhart*, 322 F.Supp.2d 282 (2004) that there were serious concerns about the fundamental fairness of the proceedings held by the ALJ and required remand to a new ALJ.

[3] Kelliher v. Glickman, 134 F.Supp. 2d 1264 (M.D. Ala. 2001).

In *Ocaslo v. Barnhart*, 2002 WL 485691 (2002), the court ordered remand to a new ALJ because of animosity between the ALJ and the claimant's attorney, as well as the ALJ's lack of sensitivity. The ALJ had a lack of sensitivity in Mr. Woodruff's case and did not protect his interests.

The legal costs and fees are generally prohibitive for most federal employees, especially those who have become disabled on the job and living on limited fixed incomes. Multiple legal fees apply to the disabled employee wherein the government has virtually unlimited legal resources and time.

**Review Is Warranted To Resolve A Conflict Between The District of Columbia Circuit's Decision And the Decisions of The Supreme Court And Other Circuit Courts Regarding The Application Of The Older Worker's Benefit Act in Settlement Agreements.**

**A. The District of Columbia Circuit Court's Decision Conflicts With This Court's Decision In *Oubre*.**

The District Court of Columbia Circuit Court of Appeals decision that the Older Workers Benefit Act conflicts directly with this Court's decision in the case of *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998).

The Older Workers' Benefit Act
Section 201 Waiver of Rights and
Claims reads:

> (f)( 1) An individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum –
>
> (A) The waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or the average individual eligible to participate; (B) the waiver specifically refers to rights or claims arising under this Act; (C) the individual does not waive rights or claims that may arise after the date the waiver is executed; (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
> **(E) the individual is advised in writing to consult with an attorney prior to executing the agreement; (F)(i) the individual is given a period of at least 21 days within which to consider the agreement** (emphasis added)
> **(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired** (emphasis added).

*Oubre* is analogous to Mr. Woodruff's case in that [Oubre] was not given "...enough time to consider her options, (2) give her seven days to change her mind.. . ."
Mr. Woodruff was not given enough time to consider his options; Mr. Woodruff was not provided the 7 days to change his mind, nor was Mr. Woodruff given the opportunity to have an attorney review the document.

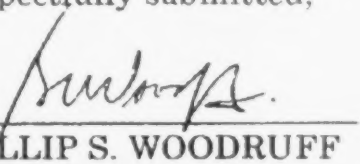
The ALJ insisted that the language was to be a part of the settlement agreement. Violating the OWPBA's requirement would cause the settlement agreement to fail. Regardless, the ALJ refused to permit Mr. Woodruff to have the benefits as noted in the OWPBA that was a part of his settlement agreement.

The Supreme Court found for Oubre that the OWPBA was violated. In the same manner, this Court should also find that the ALJ violated the OWPBA and in so doing discriminated against causing Mr. Woodruff causing him harm.

## CONCLUSION

For the foregoing reasons, petitioner Phillip S. Woodruff respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,



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## APPENDIX A

United States District Court
For The District Of Columbia Circuit
Civil Action No. 06-688

Phillip S. Woodruff,
Plaintiff

v.

Neil McPhie, Chairman,
U.S. Merit Systems Protection Board,
Defendant

## ORDER

In accordance with the Court's rulings in its Memorandum Opinion that shall be issued hereafter, it is hereby this 28th day of March, 2008

**ORDERED** that the Defendant's Motion to Dismiss is **GRANTED**.

It is further **ORDERED** that the Plaintiffs' Motion to Dismiss the Defendant's Motion to Dismiss is **DENIED**.

It is further **ORDERED** that this order shall not be deemed a final order subject to appeal until the Court has issued its Memorandum Opinion in this matter.

**SO ORDERED**

/s/_____
REGGIE B. WALTON
United States District Judge

## APPENDIX B

United States District Court
For The District Of Columbia Circuit
Civil Action No. 06-688

Phillip S. Woodruff,
Plaintiff

v.

Neil McPhie, Chairman,
U.S. Merit Systems Protection Board,
Defendant

### Memorandum and Opinion

Phillip S. Woodruff ("the plaintiff") brought this pro se lawsuit against the Chairman ("the defendant") of the United States Merit Systems Protection Board's ("the Board") Office of Equal Employment Opportunity ("EEO Office") claiming that the EEO Office improperly dismissed his administrative complaint on venue grounds and his employment status. Complaint ("Compl.") ¶¶ 1-2. The defendant now seeks dismissal of this action pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendant's Motion to Dismiss ("Def.'s Mopt."), which is challenged by the plaintiff. Opposition to Defendant's Motion to Dismiss and Motion to Dismiss Defendant's Motion to Dismiss as Untimely Filed ("Pl.'s Opp'n"). Upon consideration of the parties' submissions, the Court will grant the defendant's motion to dismiss.

## 1. Background

The Plaintiff was formerly employed by the Department of Transportation's ("Department") Federal Aviation Administration as a Supervisory Public Affairs Specialist. Def's Mot. Exhibit ("Ex.") 1 ("Board Appeal") at 1.[4] His employment was terminated on June 30, 2005. Id. at 2. Following the plaintiff's termination, he filed an Administrative appeal with the Board's Washington Regional Office alleging age and Disability discrimination and retaliation by the Department. Id. On September 22, 2005, the Plaintiff and the Department entered into a settlement agreement resolving the plaintiff's Board appeal. Id. Ex. 2("Board's Initial Decision") at 1. However, shortly thereafter, the plaintiff filed a Petition for Review ("Petition") with the Board requesting that the Initial Decision settling his administrative appeal be vacated because the administrative law judge overseeing the settlement had: (1) denied his request for accommodations for his disabilities; (2) failed to rule on pending motions; (3) engaged in ex parte communications, (4) improperly considered current EEO laws and the Older Workers' Benefit Protection Act (the "OW Act"); and (5) coerced him into signing the settlement agreement without giving him adequate time to review it. Id. Ex. 3 ("Board' Petition") at 1-2; Compl. at 1.

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[4] For ease of reference, the Court will identify the exhibits attached to the Memorandum in Support of Defendant's Motion to Dismiss bythe names the docketing clerk assigned to them.

The Board subsequently denied the plaintiff's Petition, concluding, inter alia, that the administrative law judge "made no error in law or regulation that affect[ted] the outcome" of the case. Def.'s Mot. ,Ex. 4 ("Board's Final Order") at 1-2. On April 14, 2006, the plaintiff filed a petition for judicial review with the United States Court of Appeals for the Federal Circuit; however, the plaintiff withdrew that appeal on August 24, 2006. See Woodruff v. Dep't of Transp. 197 F.App'x 929, 929 (Fed Cir. 2006).

While the plaintiff's Petition was still pending Before the Board, the plaintiff contacted the defendant's EEO office and filed a formal complaint of discrimination against the administrative law judge citing the same reasons set forth in his Petition. Def.'s Mot. Ex. 5 ("Formal EEO Complaint"). The Board's EEO office subsequently issued a decision dismissing the plaintiff's formal EEO complaint for failure to state a claim and for an improper collateral attack on the Board's adjudicatory process. Id., Ex. 6 ("Dismissal of Formal EEO Complaint") at 1. Ultimately, on April 14, 2006, the plaintiff filed his judicial complaint with this Court against the Board's Chairman for failing to review and investigate the plaintiff's discrimination allegations against the Board's administrative law judge. The defendant has now moved for dismissal of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief may be granted.

## II. Standard of Review

Dismissal under the Federal Rule of Civil Procedure 12(b)(6) is proper if a plaintiff's complaint does not "state a claim upon which relief can be granted." Fed. R. Civ. P. 12 (b)(6). Under this rule, a plaintiff need not allege specific details that prove the veracity of a claim; rather, a properly pleaded complaint only need contain a clear and concise statement of the claim sufficient to place a defendant on "notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957). However, "a plaintiff's obligation to provide the grounds of his entitlement to relief [in his complaint] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do...." Bell Atl. Corp. v. Twombly, 550 U.S. 544__, 127 S.Ct. 1955, 1964-65 (2007) (internal quotation marks and brackets omitted.) In evaluating a motion to dismiss, the Court "must accept as true all of the factual allegations contained in the complaint," Erickson v. Pardus, 551 U.S. 89 ___, 127 S.Ct. 2193, 2200 (2007) (per curiam) (citations omitted), and "grant [the] plaintiff the benefit of all reasonable inferences from the facts alleged...." Trudeau v. Fed. Trade Comm'n, 456 F.3d 178 (D.C.Cir). 2006) (citation omitted). On the other hand, the Court need not accept inferences that are unsupported by the facts set forth in the complaint or "legal conclusion[s] couched as...factual allegation[s]...." Id. (internal quotation marks and citations omitted).

However, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Swierkiewicz v. Sorena N.A., 534 U.S. 506, 514 (2002) (quoting Hishon v. King Spalding, 467 U.S. 69, 73 (1984)). Finally, for the purpose of a Rule 12(b)(6) motion, the Court may consider only the facts alleged in the complaint, any documents attached as exhibits, and matters about which the Court may take judicial notice. EEOC v. St. Francis Xavier Parochial Sch. 117 F.3d 621, 624 (D.C. Cir. 1997). (citations omitted).

## III. Legal Analysis

A. The Plaintiff's Motion to Dismiss

As an initial matter, the Court must address the plaintiff's argument that the defendant's motion to dismiss must be denied as untimely. The plaintiff contends in his motion to dismiss that the defendant's first request for an extension of time, filed on August 21, 2006, was untimely as it was filed 61 days after the complaint. Pl's Opp'n at 1. Additionally, the plaintiff raises concerns that he was not contacted by the defendant before the first request for an extension of time was filed, that his opposition to the first extension was not docketed in a timely fashion, and that he was never given the opportunity to respond to the defendant's second request for an extension of time. Id. at 1-2. The defendant has not responded to this motion.

Under the Federal Rules of Civil Procedure, a "United States officer or employee sued only in an official capacity must serve an answer to a complaint...within 60 days after service on the United States attorney." Fed. 4. Civ. P. 12((a)(2). When, as here, the last day of this period falls on a Sunday, "the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible." Fed. R. Civ. P. 6(a)(3). Thus, the defendant's response was not due until Monday August 21, 2006[5] Accordingly, the plaintiff's argument that the Defendant's motion for extension of time was untimely is without merit.

The plaintiff's remaining arguments in his motion to dismiss center around the defendant's purported failure to follow the general requirements that an attempt be made to contact opposing counsel (or an opposing party) before requesting from the Court an extension of time to file a responsive motion to the plaintiff's complaint. Federal Rule of Civil procedure 6(b)(1) addresses the extension of filing requirements, stating "the court may for good cause, extend the time: (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires."

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[5] Pursuant to Rule 12(a)(4) of the Federal Rules of Civil Procedure, once a motion to dismiss under Rule 12(b)(6) is filed a defendant need not file its answer until 10 days following the denial of the motion to dismiss. Therefore, the defendant's answer cannot be considered untimely as the Court is now jut ruling on the defendant's motion to dismiss.

Fed. R. Civ. P. 6(b)(1). The Court therefore has discretion to grant timely requests for two extensions of time. Accordingly, the Court will deny the plaintiff's motion to dismiss the defendant's dismissal motion on the ground that it was untimely.

B. The Defendant's Motion to Dismiss

(1) Is the plaintiff precluded from initiating action against the Board under Title VII and the OW Act?

The defendant argues that Title VII and the OW Act only allow employees to sue their employers, and therefore as a non-employee of the Board, the plaintiff cannot bring suit against the defendant. Def. Mot. At 4-5. The plaintiff argues in response that notwithstanding his non-employee status, he was informed by members of the Board's EEO office that it was a proper filing of his administrative complaint against the administrative judge. Pl.'s Opp'n at 4-5.

Even if the plaintiff is correct about what he was told, the critical question is whether the Court can provide the relief the plaintiff seeks under Title VII of the Civil Rights Act, the [OW] Act and other applicable laws." See Compl. at 1 "Title VII provides a former employee with a remedy only against his or her employer and does not create an independent cause of action against the EEOC [Equal Opportunity Commission] for its investigation and processing of a charge."

Packer v. Garrett, 735 F.Supp, 8,9 (D.D.C. 1990) (internal quotation marks omitted) (emphasis in original); Young v. Sullivan, 733 F.Supp. 131 (D.D.C. 1990); see also McCottrell v. EEOC, 726 F.2d 350, 351 (7th Cir. 1984); Ward v. EEOC, 719 F.2d 311, 313 (9th Cir. 1983), cert. denied, 466 U.S. 949 (1979); Georator Corp. v. EEOC, 592 F.2d 765 (4th Cir. 1979); Gibson v. Missouri Pac. R.Co., 579 F.2d 890, 891 (5th Cir. 1978), cert denied, 440 U.S. 921 (1979). The Age Discrimination in employment Act ("ADEA") – which was amended by the OW Act – has been construed to create only rights against an alleged employer discrimination and not the bodies who investigate the allegations of employment discrimination. See Svenson v. Thomas, 607 F.Supp 1004, 1006 (D.D.C. 1985) (dismissing discrimination claim of non-employee against EEOC under Rule 12(b)(6) for failure to state a claim).

Here, it is undisputed that the plaintiff was never employed by either the Board's EEO office of the Board itself. Pl's Opp'n at 5. Accordingly, the Court concludes that neither Title VII nor the OW Act provide the plaintiff's basis for relief against the Board. The plaintiff's sole remedy under Title VII and ADEA lies against the head of the employing agency that allegedly postponed the discrimination, and therefore these clams cannot be maintained against the defendant. See Svenson, 608 F.Supp.at 1004.

(2) Do agency regulations preclude a collateral attack on the adjudication of a Board appeal?

The defendant also argues that this action cannot be maintained because "the EEO [administrative] complaint process is unavailable to challenge the actions of an administrative [law] judge in the adjudication of a Board's appeal." Def.'s Mot. At 6. The plaintiff responds that his claims against the Board's EEO office had not previously been adjudicated by the Board, and further characterizes his claims as "deal[ing] specifically with the apparent false information" provided by the Board's EEO office personnel. Pl.'s Opp'n at 6. However, all of the issues presented by the Plaintiff related to the Board's failure to review or properly address his claims. Id. at 3-4. The remedies sought by the plaintiff re for the Court to reverse the Board's EEO office's decision and compel it to investigate the plaintiff's underlying claims. Compl. at 3. However, the EEOC has concluded that individuals may not use the EEO complaint process to lodge collateral attacks on other proceedings, see, e.g. Gryder v. Merit Sys. Prot. Bd., EEOC Appeal No. 01997117 (January 19, 2001) (interpreting 29 C.F.R. Sec. 1614.107(a)(1) as only allowing EEO complaints to be brought by employee complaints and applicants for employment and reaffirming that non-employee complaints constitute impermissible collateral attacks on Board proceedings), a position with which the Court agrees.

Moreover, because the Federal Circuit Court of Appeals has "exclusive jurisdiction of an appeal from a final orders or final decision of the MSPB [the Board]," 28 U.S.C. Sec. 1295(a)(9); see 5 U.S.C. Sec. 7703(a)(b), any other judicial body is precluded from reviewing final decisions of the Board. Therefore, this Court cannot grant the plaintiff's requested relief because it is without authority to compel the Board's EEO office to take action requested.[6]

## IV. Conclusion

For the aforementioned reasons, the Court will **GRANT** the Defendant's Motion to Dismiss and **DENY** the Plaintiff's Motion to Dismiss the Defendant's Motion to Dismiss.[7]

**SO ORDERED** this 23rd day of January, 2009.

REGGIE B. WALTON
U.S. States District Judge

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[6] The defendant further asserts that the plaintiff's claims are also barred as res judicata since the Board denied the plaintiff's Petition and the plaintiff had the opportunity for judicial review of that denial before the Federal Circuit. Def's Mot. At 8. In response, the plaintiff contends that his claims are narrowly pled against the Board's EEO office characterizing them as incapable of prior adjudication and thus not barred by res judicata. Pl.'s Opp'n at 6. However, there is no need to reach the issue of res judicata, as none of the plaintiff's claims provide a legal basis for the relief he seeks.

[7] An Order consistent with this Memorandum and Opinion was issued on March 28, 2008.

## APPENDIX C

**MANDATE**
**Pursuant to the provisions of Fed. R.App. Pro.41(a)**
**Issued: 8/13/2010**
**By /s/**

United States Court of Appeals
For The District Of Columbia Circuit
No. 09-5086 September Term, 2009
FILED ON: JUNE 25, 2010

PHILLIP S.WOODRUFF,
APPELLANT
v.
NEIL MCPHIE, CHAIRMAN,
U.S.MERIT SYSTEMS
PROTECTION BOARD,
APPELLEE
Appeal from the United States
District Court for the District
of Columbia
(No. 1:06-cv-00688-RBW)

Before: HENDERSON, TATEL, and
GRIFFITH, *Circuit Judges*.

**JUDGMENT**

This case was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties pursuant to D.C. Circuit Rule 34(j). It is

**ORDERED** and **ADJUDGED** that the judgment of the district court be affirmed. Phillip S. Woodruff challenges an adverse decision of the Merit Systems Protection Board (MSPB), alleging discrimination and other misconduct by the administrative law judge who handled his case. The district court properly dismissed Woodruff's complaint for failure to state a claim.

We directed the parties to address the timeliness of this appeal. The district court issued an order purporting to dismiss this case in March 2008 but stated in that order, "[T]his Order shall not be deemed a final order subject to appeal until the Court has issued its Memorandum Opinion in this matter." *Woodruff v. McPhie*, No. 06-688 (D.D.C. Mar. 28, 2008). Ten months later, the court issued its opinion, and this appeal followed. As measured from the opinion, the appeal is timely, but as measured from the earlier order, it is not. Pursuant to our decision in *St. Marks Place Housing Co. v. HUD*, No. 09-5257 (D.C. Cir. June 25, 2010), we conclude that the court did not issue a final decision, which was necessary to start the clock for an appeal, until it released its memorandum opinion. *See* 28 U.S.C. § 1291 (appeals arise from district courts' "final decisions"). Because Woodruff timely filed his notice of appeal following that opinion, we have jurisdiction.

On the merits, Woodruff alleges that the MSPB violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and the Age Discrimination in Employment Act (ADEA), as amended by the Older Workers' Benefit Act, 29 U.S.C. §§ 621 *et seq.*, in its handling of his employment appeal. Neither statute, however, creates a cause of action against the MSPB for its processing of .a case. *See Smith v. Casellas*, 119 F.3d 33, 34 (D.C. Cir. 1997) ("Congress has not authorized, either expressly or impliedly, a cause of action against the EEOC for the EEOC's alleged negligence or other malfeasance in processing an employment discrimination charge."); *McCottrell v. EEOC*, 726 F.2d 350, 351 (7th Cir. 1984) (rejecting Title VII claim against the EEOC for its handling of a discrimination complaint); *Ward v. EEOC*, 719 F.2d 311, 313 (9th Cir. 1983) (same); *Gibson v. Mo. Pac. R.R. Co.*, 579 F.2d 890, 891 (5th Cir. 1978) (same).

To the extent Woodruff has a claim under either Title VII or the ADEA, it is against his former employer, the Department of Transportation.

Woodruff insists that the MSPB's EEO Office told him that bringing this action was the proper way to contest the Board's handling of his case. But as the district court stated, "[e]ven if [Woodruff] is correct . . . the critical question is whether the Court can provide the relief [he] seeks," and under Title VII and the ADEA, we cannot. *Woodruff v. McPhie*, 593 F. Supp. 2d 272, 277 (D.D.C. 2009).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

*Per Curiam*

**FOR THE COURT:**
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk

## APPENDIX D

**Pursuant to the provisions of Fed. R.App. Pro.41(a)**
**Issued: 8/13/2010**
**By /s/**

United States Court of Appeals
For The District Of Columbia Circuit
No. 09-5086 September Term, 2009
FILED ON: JUNE 25, 2010

PHILLIP S.WOODRUFF,
APPELLANT
v.
NEIL MCPHIE, CHAIRMAN,
U.S.MERIT SYSTEMS
PROTECTION BOARD,
APPELLEE
Appeal from the United States
District Court for the District
of Columbia
(No. 1:06-cv-00688-RBW)

Before: HENDERSON, TATEL, and GRIFFITH, *Circuit Judges*.

**JUDGMENT**

This case was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties pursuant to D.C. Circuit Rule 34(j). It is

**ORDERED** and **ADJUDGED** that the judgment of the district court be affirmed. Phillip S. Woodruff challenges an adverse decision of the Merit Systems Protection Board (MSPB), alleging discrimination and other misconduct by the administrative law judge who handled his case. The district court properly dismissed Woodruff's complaint for failure to state a claim.

We directed the parties to address the timeliness of this appeal. The district court issued an order purporting to dismiss this case in March 2008 but stated in that order, "[T]his Order shall not be deemed a final order subject to appeal until the Court has issued its Memorandum Opinion in this matter." *Woodruff v. McPhie*, No. 06-688 (D.D.C. Mar. 28, 2008). Ten months later, the court issued its opinion, and this appeal followed. As measured from the opinion, the appeal is timely, but as measured from the earlier order, it is not. Pursuant to our decision in *St. Marks Place Housing Co. v. HUD*, No. 09-5257 (D.C. Cir. June 25, 2010), we conclude that the court did not issue a final decision, which was necessary to start the clock for an appeal, until it released its memorandum opinion. *See* 28 U.S.C. § 1291 (appeals arise from district courts' "final decisions"). Because Woodruff timely filed his notice of appeal following that opinion, we have jurisdiction.

On the merits, Woodruff alleges that the MSPB violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and the Age Discrimination in Employment Act (ADEA), as amended by the Older Workers' Benefit Act, 29 U.S.C. §§ 621 *et seq.*, in its handling of his employment appeal. Neither statute, however, creates a cause of action against the MSPB for its processing of a case.
*See Smith v. Casellas*, 119 F.3d 33, 34 (D.C. Cir. 1997) ("Congress has not authorized, either expressly or impliedly, a cause of action against the EEOC for the EEOC's alleged negligence or other malfeasance in processing an employment discrimination charge.");
*McCottrell v. EEOC*, 726 F.2d 350, 351 (7th Cir. 1984) (rejecting Title VII claim against the EEOC for its handling of a discrimination complaint);
*Ward v. EEOC*, 719 F.2d 311, 313 (9th Cir. 1983) (same); *Gibson v. Mo. Pac. R.R. Co.*, 579 F.2d 890, 891 (5th Cir. 1978) (same).

To the extent Woodruff has a claim under either Title VII or the ADEA, it is against his former employer, the Department of Transportation.

Woodruff insists that the MSPB's EEO Office told him that bringing this action was the proper way to contest the Board's handling of his case. But as the district court stated, "[e]ven if [Woodruff] is correct . . . the critical question is whether the Court can provide the relief [he] seeks," and under Title VII and the ADEA, we cannot.
*Woodruff v. McPhie*, 593 F. Supp. 2d 272, 277 (D.D.C. 2009).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

*Per Curiam*

**FOR THE COURT:**
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk

## APPENDIX E

United States Court of Appeals
For The District Of Columbia Circuit
No. 09-5086 September Term 2009
1:06-cv-00688-RBW
Filed On: July 28, 2010

Phillip S. Woodruff,
Appellant

v.

Neil McPhie, Chairman,
U.S. Merit Systems Protection Board,
Appellee

**BEFORE:**

Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel,Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

**ORDER**

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is **ORDERED** that the petition be denied.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk